Supreme Court, U. S.
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74-942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974 No.

FRANK L. RIZZO, et al.,
Petitioners,

v.

GERALD G. GOODE, et al., etc.
Respondents

HONORABLE JAMES H. J. TATE, et al.,

FRANK L. RIZZO, et al.,
Petitioners,

v.

COUNCIL OF ORGANIZATIONS OF PHILADELPHIA POLICE ACCOUNTABILITY AND RESPONSIBILITY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

---

The petitioners Frank L. Rizzo, et al. and Honorable James H. J. Tate, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 1, 1974.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, filed November 1, 1974, is not yet reported and is set forth in the Appendix hereto, beginning at page 4a.

The Final Judgment of the United States District Court for the Eastern District of Pennsylvania, dated October 5, 1973, and the Appendix accompanying that judgment has not been reported and is set forth in the Appendix hereto, beginning at page 20a.

The findings of fact and conclusions of law of the District Court are contained in the Court's Opinion dated March 14, 1973 which is reported at 357 F. Supp. 1289 (E. D. Pa. 1973).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 1, 1974. A timely petition for rehearing *en banc* was denied on December 6, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1245 (1).

QUESTIONS PRESENTED

Is it an abuse of injunctive power of the federal district courts for a court to assume control of a major aspect of the operations of a municipal police department, require the issuance of its own intra-departmental procedural directives and maintain a continuing judicial surveillance over the department's operations?

Is equitable relief precluded where the legal remedies available are not only adequate, but are spcifically drawn to protect the very interests which the equitable relief seeks to protect?

STATUTORY PROVISIONS INVOLVED

Civil Rights Act of 1871:

42 USC Section 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This Petition arises from the decision of the United States Court of Appeals for the Third Circuit to affirm the judgment of the United States District Court for the Eastern District of Pennsylvania. The District Court, through a mandatory injunction, directed the Philadelphia Commissioner of Police to revamp the Police Department's internal procedures for disciplining policemen in order to provide a public forum for hearing citizen complaints of police misconduct.

Two separate cases were filed by different plaintiffs purporting to represent essentially the same class of persons and suing generally the same defendants, i.e. the Mayor and other officials of the City of Philadelphia and its Police Department. These two cases, *Goode, et al.* v. *Rizzo, et al.* and *COPPAR, et al.* v. *Tate, et al.*, were tried separately to conclusion, but were consolidated by the District Judge for purposes of decision.

Goode, et al. v. *Rizzo, et al.*

On February 17, 1970, the Goode plaintiffs filed their complaint in this case. Defendant-petitioners are Frank L. Rizzo, Mayor of the City of Philadelphia, Hillel S. Levinson, Managing Director of the City of Philadelphia, Joseph F. O'Neill, Police Commissioner and Police Captain William Murphy.[1] The complaint alleged that two Philadelphia police officers, Anthony DeFazio and John D'Amico, had engaged in a practice of violating the

[1] These defendants were substituted by Order of the District Court dated September 11, 1973. The original defendants were former Mayor James H. J. Tate, former Managing Director Fred T. Corleto, former Police Commissioner Frank L. Rizzo, former Deputy Commissioner of Police Robert G. Selfridge and Captain Murphy.

constitutional rights of black citizens of the City of Philadelphia. Officers DeFazio and D'Amico were never made defendants.

By way of relief, plaintiffs sought a mandatory injunction requiring defendants to revise their disciplinary procedures with regard to handling citizen complaints of police misconduct. Plaintiffs also demanded that DeFazio and D'Amico be dismissed from the Police Department.

The petitioners moved for dismissal, first under F.R.Civ.P. 12(b)(6) and subsequently pursuant to F.R.Civ.P. 41(b). Your petitioners asserted that Officers DeFazio and D'Amico were indispensible parties whom plaintiffs failed to join; that absent a showing that the named defendants deprived the plaintiffs of any federally protected right, the defendants could not be held liable; and that, in any event, the Court had no authority to intrude into the internal administration of the Police Department in the manner sought by plaintiffs.

The District Court denied both motions to dismiss, although the Court did ultimately hold that since DeFazio and D'Amico were not parties to this suit, no relief could be directed against them. 357 F. Supp. at 1318-9.

In essence, it was the position of plaintiffs and ultimately of the District Court that there were incidents of police misconduct which called for disciplinary action, but where no disciplinary action was taken; and that there were incidents in which the disciplinary action taken was not sufficiently severe. In making its findings of fact, the District Court recounted nine incidents, occurring over a period of nine months, of alleged misconduct on the part of Officers DeFazio and/or D'Amico. 357 F. Supp. 1294-1301. Of these nine incidents the Court found that on four occasions complaints to the Police Department had been made regarding the officers' conduct. The Court found that the offending officer was disciplined on two

occasions,[2] was not disciplined on one occasion;[3] and, on one occasion the complainant refused to press charges when advised to do so by the police.[4]

COPPAR, et al. v. *TATE, et al.*

The complaint in *COPPAR* v. *Tate*[5], was filed on September 3, 1970 following the most difficult summer for Philadelphians since the City was torn by urban riots in 1964. The tensions of the summer of 1970 culminated in late August when the events directly leading to the COPPAR suit occurred.

On August 29, a man walked into a Philadelphia Police station and shot and killed the desk sergeant, Frank Von Colln. Nearby, on that same evening, another policeman, while sitting in his patrol car, was shot and seriously wounded by a sniper. On August 30, two other policemen were shot and seriously injured when they stopped a suspected stolen car. Adding to the tension produced by these incidents, the Black Panther Party had chosen Philadelphia to be the host city for the "Revolutionary Peoples Constitutional Convention" which was to bring some 6,000 advocates of violent and non-violent political revolution into the City. That convention was scheduled to begin on September 4 and continue through September 7.

Members of the Black Panther Party were suspected by the police of being involved with the shootings of the police officers. On August 31, 1970 the police attempted to search various premises used by the Black Panther

[2] Louise J. Reed incident, 357 F. Supp. at 1300. Anti-Semetic remarks incident, 357 F. Supp. at 1300.

[3] Gerald Goode incident, 357 F. Supp. at 1295-6.

[4] Joseph Reas incident, 357 F. Supp. at 1299-1300.

[5] COPPAR is an acronym for Council of Organizations on Philadelphia Police Accountability and Responsibility.

Party. At one of the premises, the attempt to serve the search warrant was met with gunfire from the persons inside the property. After a brief gunfight with the police, the occupants surrendered, emerged and were strip searched by the policemen on the scene. None of the occupants were injured.

On September 3 the plaintiffs in *COPPAR, et al.* v. *Tate, et al.* filed the complaint initiating their action together with motions for preliminary injunction and temporary restraining order. Defendant-petitioners are James H. J. Tate, former Mayor of the City of Philadelphia, Frank L. Rizzo, former Police Commissioner and Fred T. Corleto, former Managing Director. COPPAR sought to enjoin defendants from interfering in any way with the then immenent "Revolutionary Peoples Constitutional Convention", even in the event of emergency circumstances, and from holding in custody and prosecuting several of the named plaintiffs. COPPAR further sought an order appointing a "special master" as "receiver" for the Police Department.

COPPAR's Complaint recounted the August 29 to September 7 events described above; and, in a somewhat repetitive series of averments, COPPAR accused defendant Rizzo of threatening Philadelphia's black community with genocide[6] and averred conclusory generalities accusing the defendants of implementing within the Police Department a policy of intimidation and harrassment towards black persons solely because of their race.

[6] Typical of these allegations is paragraph 22 where COPPAR avers

> That the defendant Rizzo has openly, brazenly and illegally threatened the physical extermination and acts of genocide against the Black Community. . . . (sic.)

In support of this scandalous matter, COPPAR quoted from a statement regarding the murder of Sergeant Von Colln made by an obviously distraught and justifiably angry Police Commissioner.

Plaintiffs in this action were COPPAR itself, the Black Panther Party, the Southern Christian Leadership Conference, the Young Lords Party, and twenty-one individuals. On defendants' motion the Black Panther Party and the Young Lords Party were dismissed for failure to comply with discovery orders of the District Court. 357 F. Supp. at 1319. Of the twenty individual plaintiffs, only one, Mary Rouse, presented any testimony. She did not testify to having personally suffered any harrassment or intimidation at the hands of the Police Department or that any such activity was ever directed against her. Of the group plaintiffs, COPPAR testified in the persons of Mary Rouse and Floyd Platten. They likewise did not testify to having suffered any harrassment or intimidation at the hands of the Police Department. Their testimony consisted of second-hand descriptions of incidents of alleged police misconduct which precipitated complaints to COPPAR.

The District Court refused to enter the temporary restraining order prayed for, but did issue an order enjoining police officers from violating the constitutional rights of the plaintiff class, thus merely enjoining the police from performing their job improperly.

The "Revolutionary Peoples Constitutional Convention" came and went without any serious incidents involving the Police Department or any of the defendants. On September 21 and October 21 the defendants filed motions for dismissal asserting that since the convention had passed without incident, the bulk of the lawsuit was moot, that COPPAR otherwise failed to state the cause of action since plaintiffs were not entitled to having their prosecutions enjoined and since a federal district court lacked the power to appoint the requested receiver, and that, excluding those averments mooted by the uneventful convention, the remaining averments were so broad and

conclusory as to fail to state a cause of action.[7] The District Court did recognize the prejudice to defendants in attempting to defend a case in which the complaint stated no facts. The Court required COPPAR to file with the Court and serve upon defendants memoranda of witnesses and incidents. COPPAR filed several of these memoranda which gave the name and address of a witness and the briefest possible description of some sixty-nine incidents. The District Court later took the position that these memoranda were sufficient to obviate the necessity to dismiss the complaint. 357 F. Supp. at 1319.

The District Court heard evidence of 28 incidents of alleged police misconduct. The Court determined that in four incidents[8], there was no police misconduct. With regard to one incident[9], the Court was satisfied that defendants had remedied whatever problems had existed. The Court specifically critized the conduct of police officers in two incidents.[10] In the remaining incidents, the Court made its findings without editorial comment on the conduct of either the citizens or the police officers involved.

After reviewing the evidence in both cases the Court concluded that violations of the legal and constitutional rights of citizens are committed by only a small percentage of police officers, but also that such violations do occur too frequently to be dismissed as rare instances. 357 F. Supp. at 1318. The Court also concluded that the evidence did not disclose any departmental policy to violate rights of citizens nor any policy of racial bias or

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[7] The District Court ultimately conceded, at least on those last grounds, that the Motion to Dismiss was probably meritorious. 357 F. Supp. at 1319.

[8] Charles Blackman incident, 357 F. Supp. at 1301; Dennis Holland incident, 357 F. Supp. at 1289; Adalberto Molinas incident, 357 F. Supp. at 1306; Fred Brooks incident, 357 F. Supp. at 1310.

[9] Robert Nicholas incident, 357 F. Supp. at 1301.

[10] Locke and Perry incident, 357 F. Supp. at 1310; Brown and Smalley incident, 357 F. Supp. at 1315.

discriminatory enforcement on racial lines. 357 F. Supp. at 1318, 1319. The Court concluded that the existing police procedures for handling citizen complaints of police misconduct were inadequate, 357 F. Supp. at 1318, but also that the plaintiff class had no constitutional right to have those procedures improved. 357 F. Supp. at 1321.

The trial of the *Goode* case was completed by November 30, 1970, and the trial of the *COPPAR* case concluded on March 9, 1971. Approximately two years later, on March 15, 1973, the District Court entered an Opinion and Order for both cases consolidating them for purposes of relief. 357 F. Supp. at 1290. The Opinion reviewed the evidence presented in both cases and held that the police procedures for handling citizen complaints of police misconduct were insufficient and ordered defendant to submit a revised program. That program was to be in accordance with the views of the Court as expressed in its Opinion.

Defendants prepared and submitted a revised program, thereby precipitating counter proposals and a series of settlement discussions which continued until September, 1973. Nevertheless the defendants informed the Court and opposing counsel that they reserved the right to object to the grant of any relief. On October 5, 1973 the District Court issued its "Final Judgment" (Appendix, p. 20a) which requires inter alia, that the Police Commissioner of Philadelphia promulgate, as an intra-departmental directive, procedures for the receipt, investigation and disposition of civilian complaints of police misconduct. The directive was to be in the form of a sample directive which was appended to the Court's order.

A timely appeal was taken from the Final Judgments of the District Court in both the *Goode* and *COPPAR* cases as well as from the Order of the Court which granted attorneys' fees in each case. On November 1, 1974

the Third Circuit Court, per the Honorable Joseph F. Weis, Jr., affirmed the District Court as to the injunctive relief granted but vacated and remanded the award of counsel fees.

Notwithstanding the specific findings of the District Court that only a small percentage of Philadelphia policemen violated the legal and constitutional rights of citizens and that there was no departmental policy of racial bias or to deny citizens their legal and constitutional rights, the Circuit Court held that the District Court's remedy was proper because the District Court also found that incidents of police misconduct on the part of that small percentage of officers could not be dismissed as rare isolated instances, and that the new procedures had the potential for prevention of future misconduct. Furthermore the Circuit Court agreed with the District Court that plaintiffs were not entitled to revised procedures as a matter of constitutional right, and recognized that the District Court's procedures were simply the Court's idea of a wiser method of police administration.

Defendant-petitioner filed a timely petition for rehearing which was denied by the Court en banc on December 6, 1974.

REASONS FOR GRANTING THE WRIT

Point 1

In assuming control over a major aspect of the operations of the Philadelphia Police Department, in requiring the issuance of its own intra-departmental procedural directives and in maintaining a continuing judicial surveillance over the operations of the department, the lower court abused its injunctive power.

As the Circuit Court recognized, this controversy centers on a balancing between the functions of a Federal District Court and a municipal police department. Based on a record which presents some thirty-seven incidents of alleged police misconduct (many of which evidence no improper conduct) over more than a one and one-half year period, the District Court concluded that it was necessary to issue a mandatory injunction requiring the Police Commissioner to implement the Court's procedures for the receipt, investigation and adjudication of citizen complaints of police misconduct. The District Court's directive requires that all complaints of police misconduct be investigated (Appendix, p. 26a), specifies the method of investigation (Appendix, p. 27a-28a); and, in cases where investigation discloses factual dispute, requires a public adversary hearing on the merits of the charge.

Although the Circuit Court agreed that it would be improper for a federal district court to inject itself into the day to day operations of the Police Department, the Circuit Court held that in this case the District Court had not done so. Although defendants do not agree that the propriety of the District Court's intrusion turns on whether the intrusion is on a day to day basis or not,[11]

[11] It should be noted that in its Judgment the District Court retained jurisdiction and required defendants to maintain statistics in order to effect a continuing regulatory surveillance over the performance of the Police Department.

the plain intent of the Court's directive is to control those day to day operations of the Police Department relating to the receipt, investigation and disposition of citizen complaints of police misconduct. Moreover by promulgating its own directive without regard to such mundane but nevertheless important administrative considerations as availability and deployment of personnel, the Court's Order seriously affects the entire police function.

The procedures proposed by the District Court require the investigation of *all* complaints regarding the conduct of police officers. (Appendix, p. 26a). Except for complaints determined to be frivolous, each complaint must be fully investigated. To be acceptable to the Court, the investigation must include interviews with the complainant and/or victim, the defendant police officer, all other officers involved, all officers witnessing the occurrence, all other witnesses and possible witnesses, and a reviewing and analysis of all physical evidence. (Appendix, p. 27a). The investigation must be completed in forty-five days. (Appendix, p. 28a). In all cases where the investigation produces a factual dispute regarding the occurrence, the police must convene a quasi-judicial tribunal for the purpose of conducting a public trial of an adversary nature between the complainant and the police officer. (Appendix, p. 33a). These procedures apply only to complaints of citizens which, if taken as true, *do not* allege that the police officer has committed a crime. Complaints alleging a crime are processed in accordance with another set of procedures. (Appendix, p. 32a).

Despite disclaimers of both the Circuit Court (Appendix, p. 11a) and the District Court, 357 F. Supp. at 1321, the procedures established by the District Court will severely interfere with the Police Department's primary purpose to prevent and detect crime. In Philadelphia, a city of two million people with the distressingly high

crime rate common to virtually all of this nation's large cities, the sheer volume of crime often precludes the type of thorough investigation which the district court requires, under pain of contempt of court, for matters which are not crimes. The Police Commissioner, otherwise responsible for deployment of police personnel, must, under the threat of contempt, assign his investigators in such a manner as to insure that all non-criminal complaints regarding police conduct are thoroughly investigated within the forty-five day limit set by the Court. These complaints must be investigated regardless of the number of crimes remaining unsolved, regardless of the number of crimes to be investigated and regardless of the availability of investigatory personnel.

Even in properly performing his duty, the police officer of necessity constitutes an annoyance to persons breaking the law and to persons whom the officer has probable cause to believe are breaking the law. It is safe to say that virtually every otherwise law abiding person has felt such annoyance on receiving a traffic ticket. Yet complaints arising out of petty annoyance must be investigated and can only be dismissed as frivolous when the investigation demonstates that the complaint and the evidence can in no way be interpreted as constituting improper conduct. (Appendix, p. 31a). In a city of two million people, in a metropolitan area of five million people, the number of complaints of improper conduct on the part of police can be expected to be large. To be sure some will allege grievous misconduct and even criminal conduct on the part of a police officer, but the overwhelming majority will allege non-criminal conduct in the nature of a personal affront to the complainant.

On a scale of threats to society, police incivility, however distasteful, must be ranked far below homicide, rape, arson, assault and battery and myriad other crimes against

the person and property. The unfortunate result of the District Court's intrusion into management of departmental policy and procedure will be that, in a city which has already experienced more than twenty murders in the first eight days of 1975, your petitioners will be required to thoroughly investigate accusations of rudeness on the part of a police officer or be held in contempt for failure to do so.

It is fundamentally unwise for a federal district judge to assume the local executive's responsibility for administration of the community's police department, even assuming that the judge possesses the necessary competence to do so. Basic decisions, such as setting priorities for allocation of investigatory personnel, cannot be made by the police administrator. Rather, such decisions are to be made by the court or with the court's approbation after petition and hearing. Police administration by court order, in the context of an adversary proceeding, ill serves the public interest.

The Circuit Court decided that the injunctive relief was proper and held that the revisions in the disciplinary procedures were justified because they appeared to have the potential for prevention of future police misconduct. The Circuit Court's legal reasoning has been rejected by this Court. *O'Shea* v. *Littleton,* 414 U.S. 488 (1974); *Gilligan* v. *Morgan,* 413 U.S. 1 (1973).

In *O'Shea* v. *Littleton,* plaintiffs alleged that certain county judicial officers had engaged in a pattern and practice of violating the constitutional rights of the plaintiff class. Plaintiffs sought "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials." 414 U.S. at 500. The District Court dismissed the complaint, but the Seventh Circuit Court reversed ruling that in the event plaintiffs proved their allega-

tions, the District Court should "fashion appropriate injunctive relief to prevent petitioners [defendants] from depriving others of their constitutional rights in the course of their carrying out their judicial duties in the future." 414 U.S. at 492-3. As is true here, the Seventh Circuit Court disclaimed any intention of requiring the District Court to sit in day-to-day supervision of the defendant judicial officers, but suggested that the District Court require periodic reports from defendants on their judicial activities. This Court reversed and held that the complaint was properly dismissed. This Court disapproved of the injuction envisioned by the Circuit Court which would have resulted in "nothing less than an ongoing federal audit of state criminal proceedings," 414 U.S. at 500; it would have run counter to fundamental principles of federalism and unnecessarily and unwisely involved the equitable powers of the federal courts, particularly the power to hold a violator of an injunction order in contempt of court, in the state criminal process. 414 U.S. at 501-2.

In *Gilligan* v. *Morgan* this Court considered a complaint which asked a federal district court to evaluate the training, weaponry and orders of the Ohio National Guard and to assume a continuing regulatory jurisdiction over the Guard. The District Court dismissed the complaint, but the Sixth Circuit Court reversed in part and remanded the case to the District Court with instructions to determine if there was a pattern of training, weaponry and/or orders which make inevitable the unnecessary use of fatal force in suppressing civilian disorders. *Morgan* v. *Rhodes,* 456 F. 2d 608 (1972). This Court held that the case did not present a justiciable controversy. Although the clear cut federal separation of power issue present in *Gilligan* is not involved in the instant case, the fundamental issues are identical in both cases. Here the District Court has

ordered changes in police training, has rewritten departmental orders, has retained jurisdiction over the case and has required the police department to keep statistics in order that a continuing judicial serveillance can be maintained. The control over police operations which the District Court has assumed is precisely what this Court in *Gilligan* found to be inappropriate for a district court to undertake. See also *Calvin* v. *Conlisk,* 367 F. Supp. 476 (N.D. Ill. 1973); *Build of Buffalo, Inc.* v. *Sedita,* 441 F. 2d 284 (2nd Cir., 1971).

In both *Allee* v. *Medrano,* — U.S. —, 40 L. Ed. 2d 566 (1974) and *Hague* v. *C.I.O.,* 307 U.S. 496 (1939), this Court affirmed injunctions against deliberate governmental policies of using law enforcement personnel to violate the constitutional rights of citizens. Both cases involved efforts by law enforcement officials to crush nascent labor unions. In *Allee,* notwithstanding the affirmance of the grant of injunctive relief, this Court was constrained to point out:

> On its face the injunction does not more than require the police to abide by constitutional requirements; and there is no contention that this decree would interfere with law enforcement by restraining the police from engaging in conduct that would be otherwise lawful. 40 L. Ed. 2d at 579-81.

In *Hague,* this Court vacated those portions of the District Court's injunction which purported to enumerate conditions under which the defendant law enforcement officials could properly act. This Court held that the courts lacked the power to effectively "rewrite" ordinances. 307 U. S. at 518.

Here, in a case where the lower court specifically refused to find any departmental policy to violate anyone's constitutional rights, where there was no evidence

or finding of any unconstitutional conduct on the part of any defendant and where both the District Court and the Circuit Court held that plaintiffs had no constitutional entitlement to revision of police disciplinary procedures, the Circuit Court affirmed the grant of injunctive relief which goes far beyond merely requiring the police to abide by the Constitution, which will interfere, both directly and indirectly, with the primary police function of law enforcement and which rewrites departmental regulations in accordance with the District Court's concepts of more enlightened procedures for police administration.

In affirming the District Court's grant of relief, the Circuit Court authorized that Court to stray far beyond the bounds of judicial power, experience and competence. The Circuit Court ignored or overlooked the decisions of this Court which your petitioners submit preclude the type of injunctive relief granted here. To remedy these errors, petitioners respectfully request this Court to grant this petition for certiorari.

Point 2

The legal remedies provided by the civil rights acts and state tort law obviate the necessity for equitable relief.

It is hornbook law that the basic prerequisites for the issuance of equitable relief are that plaintiffs stand to suffer substantial and immediate irreparable injury and that plaintiffs have no adequate remedy at law. *O'Shea* v. *Littleton, supra* at 502. Although the District Court and the Circuit Court determined otherwise, the injunctive relief at issue here was granted in spite of numerous adequate legal remedies. The District Court's finding of inadequate remedies was twofold: first, the Court found for various reasons that the Police Department's existing internal disciplinary proceedings were inadequate, and

second, the Court found that the existing federal and state legal remedies were inadequate. In affirming the District Court, the Circuit Court considered only the finding of inadequacy in police disciplinary procedure and completely ignored the presence of adequate federal and state legal remedies.

The District Court found that the existing disciplinary procedures were inadequate because, inter alia, the procedures were geared to handle violation of police regulations but did not cover specific violations of constitutional rights, that the "chain of command" basis for handling complaints had the effect of discouraging them, and that there was no opportunity for the complainant to present his case to an objective tribunal which would decide his case and inform him of a decision. District Court, in reality, found that the police disciplinary procedures were inadequate when measured on a yardstick of the Court's own creation. No one has ever intimated that the police disciplinary procedures were geared to handle anything other than infractions of police regulations or that the police were not a quasi-military organization which operates in accordance with a basic command structure. Furthermore, the police have absolutely no duty to provide a quasi-judicial tribunal to conduct adversary hearings for violations of constitutional rights. Neither the United States Constitution (as is conceded by both the Circuit and the District Courts), nor any Federal statute, nor the Pennsylvania Constitution, nor any Pennsylvania statute, nor the Philadelphia Home Rule Charter nor any ordinance of the City of Philadelphia purports to impose such a quasi-judicial function on the police department. Thus, in making its finding that the disciplinary procedures were inadequate, the District Court supplied itself with its own ultimate conclusion; the Court did no more than place the proverbial rabbit in the hat.

The existing police disciplinary standards were never intended to meet the standards set by the Court, but they are fully adequate for the purpose for which they were designed—to handle infractions of police regulations.

The District Court found that existing federal and state legal remedies were inadequate because they are expensive, time-consuming, not readily available and not notably successful.[12] 357 F. Supp. at 1319. This finding is tantamount to finding that the Civil Rights Act of 1871, 42 U.S.C. § 1983, is inadequate for the very purpose for which it was enacted. The purpose of that Act is to provide a private remedy for violations, under color of state law, of federally protected rights. Additionally, a similar implicit finding of inadequacy is made regarding Pennsylvania law and access to Pennsylvania courts.

Questions regarding the effectiveness of federal legislation are for Congress, not for the courts. Questions regarding the effectiveness of state legislation are for the state legislatures, not for the federal courts. The District Court's dissatisfaction with existing federal and state legal remedies in no way vests the Court with the power to create a quasi-judicial system within a municipal police department in order to fill what it perceives as gaps in the federal and state schemes.

> "It is not a function of the Courts to speculate as to whether the statute is unwise or whether the evil sought to be remedied could better have been regulated in some other manner."

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[12] The criticism that civil suits are not notably successful is most puzzling. In our judicial system, a judgment for a defendant policeman is just as final and conclusive as it is for any other defendant; it is res judicata as to liability. A criticism based on a lack of success for plaintiffs in suits against police officers seems to indicate an **a priori** judgment that defendant police officers are probably liable, even if they have not been so judged.

Mourning v. *Family Publication Service,* 411 U.S. 356, 378 (1973); see also, *Daniel* v. *Family Security Life Ins. Co.,* 336 U.S. 220, 224 (1949); *Olsen* v. *Nebraska,* 313 U.S. 236, 246 (1941). Moreover, to the extent that complaints of police misconduct allege violations of federally protected rights, the Court's procedures are largely duplicative of the existing legal remedies, and serve to give plaintiffs in court actions an opportunity to have a preliminary trial of their case in the police department prior to airing their case for damages in court.

As this Court recognized with regard to military personnel in *Gilligan* v. *Morgan,* 413 U.S. at 11-12, and judicial officers in *O'Shea* v. *Littleton,* 414 U.S. at 503, specific acts of misconduct on the part of individual police officers are certainly reviewable and punishable in the federal as well as the state courts. In *O'Shea* this Court specifically held that the presence of such remedies constituted adequate remedies at law which precluded injunctive relief. Considering the availability of other avenues of relief for violation of federal and state rights by police officers and the abrasive, unmanageable and unwise intrusion into police administration which the injunctive relief represents, petitioners respectfully submit that the Circuit Court of Appeals erred in affirming the injunctive relief granted by the District Court.

CONCLUSION

For the foregoing reasons, your petitioners respectfully submit that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on this 23rd day of January 1975, three copies of the Petition for Writ of Certiorari were hand delivered to William Lee Akers, Esquire, 805 One East Penn Square Building, Philadelphia, Pennsylvania 19107, Counsel for Respondents, and to Peter Hearn, Esquire, Pepper, Hamilton & Scheetz, 20th Floor, the Fidelity Building, Philadelphia, Pennsylvania 19109, Counsel for Respondents. I further certify that all parties required to be served have been served.

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APPENDIX

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-2023/24/25
Nos. 73-2077/78/79

GERALD G. GOODE, ET AL., ETC.,
Appellants in 73-2023

v.

FRANK L. RIZZO, ETC., ET AL.,
Appellants in 73-2024/25

COUNCIL OF ORGANIZATIONS ON PHILADELPHIA POLICE ACCOUNTABILITY, ETC., ET AL.,

v.

HON. JAMES H. J. TATE, ET AL.,
FRANK L. RIZZO, ET AL.,
Appellants in 73-2077/78

COUNCIL OF ORGANIZATIONS, ETC.,
Appellant in 73-2079

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Nos. 70-491 and 70-2430)

Argued June 10, 1974

Before: STALEY, GIBBONS and WEIS, *Circuit Judges*

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OPINION OF THE COURT

(Filed November 1, 1974)

WEIS, *Circuit Judge.*

A delicate balancing between the functions of the federal district court and the police department of the City of Philadelphia is the essence of the controversy presented in this appeal. A finding by the trial court that a modification of internal procedures for handling citizens' complaints is an adequate remedy for preventing future misconduct by a minority of police officers is sufficiently supported by the record. But, an assessment of counsel fees in this § 1983 case must be remanded for further proceedings.

Two separate cases were filed by different plaintiffs, all purporting, however, to represent essentially the same class of persons.[1] The defendants also were generally the same, being the Mayor and other city and police officials.[2] The two cases were consolidated by the district judge for

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[1] The district court ordered that the **Goode** case could be maintained as a class action on behalf of all residents of the City of Philadelphia and an included class of all black residents of Philadelphia. The complaint in the **COPPAR** case alleged the class to be composed of the plaintiff and black and white persons in the City of Philadelphia expressing political views contrary to defendants and advocating police responsibility to the community. **COPPAR** is an acronym for the Council of Organization on Philadelphia Police Accountabiltiy and Responsibility.

[2] The original complaint in the **Goode** case named the following defendants:

James H. J. Tate, Mayor, City of Philadelphia
Fred T. Corletto, Managing Director, City of Philadelphia
Frank L. Rizzo, Commissioner of Police, City of Philadelphia
Robert G. Selfridge, Deputy Commissioner of Police, City of Phila.
William Murphy, Captain, Police Department, City of Philadelphia

By Order of Court, dated September 11, 1973, the following defendants were substituted:

Frank L. Rizzo, Mayor, City of Philadelphia
Hillel S. Levinson, Managing Director, City of Philadelphia

final disposition, and we therefore, as did he, treat this litigation as unitary.

The plaintiff produced evidence which the district court found adequate to establish a pattern of violations of the legal and constitutional rights of citizens by Philadelphia police, particularly in the areas of "arrest for investigation, charges of resisting arrest when the arrest was initially unlawful, extreme over-reaction to actual or reported assaults upon policemen and in the treatment of people who question or criticize police activity in particular instances."

The testimony was presented by victims of police misconduct or witnesses to it and encompassed more than thirty-five incidents, not all of which were found to be examples of improper activity on the part of the officers. The district judge summarized each incident in his voluminous findings of fact and concluded that, while misconduct is attributable to only a small percentage of the members of the police force, the violations take place with such frequency that "they cannot be dismissed as rare isolated incidents; and that little or nothing is done by the city authorities to punish such infractions, or to prevent their recurrence."[3]

The existing police procedures for processing and adjudicating citizen complaints and for enforcing police dis-

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Continued

Joseph F. O'Neill, Commissioner of Police, City of Philadelphia
Morton B. Solomon, Deputy Commissioner of Police, City of Phila.
William Murphy, Captain, Police Department, City of Philadelphia

In **COPPAR**, the original named defendants were:

Honorable James H. J. Tate; Frank L. Rizzo; Fred T. Corletto; Arlen Spector

The record does not reveal any substitution of the named defendants, despite the court's order of March 14, 1973, directing the plaintiffs to make appropriate amendments to the caption of the case to reflect changes in personnel.

[3] **COPPAR v. Rizzo**, 357 F. Supp. 1289, 1319 (E.D. Pa. 1973).

cipline were evaluated, the court finding that the arrangements then existing were totally inadequate because:

1. The procedures were geared to handle infractions of police regulations but these rules were not framed to cover specific violations of citizens' constitutional rights;
2. Complaints were handled on a "chain of command" basis which discouraged civilian complaints;
3. There was no adequate opportunity for the complainant to present his case to an objective tribunal;
4. The outcome of the proceedings were not disclosed; and
5. There was a tendency to minimize consequences of proven police misconduct.

Although the plaintiffs has asked for a sweeping equitable decree, including the appointment of a "receiver" to supervise the police department and the civilian review of police activity, the trial court concluded that a much more limited form of relief was appropriate. It required the defendants to revise the procedures within the police department for processing citizens' complaints against the police, including such matters as:

1. Preparing and distributing appropriate forms for the submission of complaints;
2. Prompt and adequate investigation;
3. Adjudication by an impartial body insulated from command pressures; and
4. Fair opportunity for both complainants and police officers to present their cases, followed by notification to the parties of the outcome.

The court stated that its guidelines pose no threat to vigorous law enforcement, are consistent with generally recognized minimal standards, and impose no substantial burden on the police department. The district court also concluded that an award of counsel fees and expenses to the plaintiffs was justified and assessed sums totalling $39,417.58 against "the defendants."

The defendants appeal from the judgments in all respects. The plaintiffs COPPAR and Goode cross-appeal on the ground that the grant of counsel fees is inadequate, and COPPAR cross-appeals from the denial of its request for the appointment of a receiver.

I.

We first consider the defendants' challenge to the plaintiffs' standing to maintain this suit on the ground that the requirements set out in *O'Shea* v. *Littleton,* 414 U.S. 488 (1974), have not been met. In that case the Supreme Court found a lack of standing when the complaint did not allege injury on the part of any of the named plantiffs and no class determination had been made. But, a few months later, in *Allee* v. *Medrano,* — U.S. —, 42 U.S.L.W. 4736, 4740 n.10 (May 21, 1974), the Court noted, ". . . Moreover as to this portion of the decree, directed at police misconduct generally rather than to any particular state statute, named plaintiffs intimidated by misconduct may represent all others in the class of those similarly abused . . ."

In the case *sub judice,* the named plaintiff, Gerald Goode, alleged in the complaint and established at the trial an incident where he was the victim of an illegal arrest and beating by Philadelphia police.[4] Herbert Brown, another named plaintiff, alleged an illegal beating by the

police which presented an arguably constitutional violation.

While the COPPAR complaint is loosely drawn, a fair reading shows that the individual plaintiffs allege a series of illegal arrests and unauthorized entry into their homes by police officers. Many of the named plaintiffs did not testify at the hearing. However, at the direction of the trial judge at a pretrial hearing, a list of other names and a description of the incidents in which they were involved were filed with the court. Although somewhat informal, this may properly be considered an amendment to the complaint and was so treated by the district court. Many of these additional parties testified in the district court.

Although more precision and attention to the appropriate procedural rules by the parties would have been helpful, from a practical standpoint we conclude that the requisites for standing have been met.

There is a distinction too between the underlying situation in the *O'Shea* case and the instant litigation. In *O'Shea* v. *Littleton, supra,* the Court was concerned with the fact that the injunction sought by the plaintiffs would affect events which would take place during state criminal trials, thus violating the principles of *Younger* v. *Harris,* 401 U.S. 37 (1971). Here, on the other hand, the plaintiffs were concerned with alleged police practices which would not come to the attention of a state court in most instances because prosecutions were not instituted or were dismissed at a very early stage. Furthermore, unlike the *O'Shea* litigation, the Court did determine the applicable

[4] In a suit for damage in the state court against the individual police officers and the City of Philadelphia, **Goode** was given a judgment by a board of arbitration against the City of Philadelphia although no finding was entered against the policemen personally. That case was appealed to the Court of Common Pleas of Philadelphia County.

class to be all the citizens of Philadelphia and an included class of all black residents of the City.[5]

II.

The trial court's conclusion that there were widespread violations of constitutional rights through police misconduct is attacked by the defendants as being inconsistent with the finding that only a small percentage of the officers on the force are accountable for these actions. The defendants also assert that the number of separate incidents presented to the court formed an inadequate basis for a finding of a pattern or practice.

There is no mathematical formula which can be of assistance in determining how many witnesses or how many incidents are needed to establish a pattern of conduct by any group in a community. The trial judge must work with the material that is presented to him and must decide whether sufficient credible data are available to reach a conclusion. It is his responsibility primarily, and an appellate court must accord great deference to that fact finding process. In a case of this nature, too, we are conscious

[5] The designation of class was granted by the district court under the provisions of Rule 23(b)(2), which reads:

> "An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . ."

The defendants have not questioned the class designation on the basis of size or definition, and therefore, we do not consider those elements. **Cf. Lewis v. Kugler**, 446 F.2d 1343 (3d Cir. 1971).

We also note that the defendants in the case of **Alexander v. Rizzo**, Civil Action No. 70-992 (E.D. Pa. 1972), entered into a consent decree in which they stipulated that the final order was "for the benefit of every member of the class of plaintiffs referred to in the Complaint . . ." The **Alexander** complaint reveals that the action was brought on behalf of all black residents of the City of Philadelphia. (Complaint, para. 5)

of the weight which must be given to the findings of a trial judge which are dependent upon and interwoven with intensely local conditions and circumstances. *Mayor of Philadelphia* v. *Educational Equality League,* 415 U.S. 605 (1974); *White* v. *Regester,* 412 U.S. 755 (1973).[6]

We have noted also, as did the district judge, that the police officials of Philadelphia entered into a consent decree in *Alexander* v. *Rizzo, supra,*[7] agreeing to modify the procedures to be followed when a person is to be interrogated in the course of a criminal investigation. Compliance with that decree will serve to prevent recurrence of some of the types of illegal conduct about which the plaintiffs here complained. We need not consider, nor did the district court, whether this consent decree has any collateral estoppel effect as to the existence of a pattern of misconduct by police officers. Nevertheless, it was a factor to which the trial judge could give some weight in arriving at his findings.

Our review of the lengthy record in this case in addition to the contents of the appendix submitted by the parties does not reveal findings of fact which are clearly erroneous or conclusions which are not supported by reasonable interpretation of those underlying facts. *See* Fed. R. Civ. P. 52; Wright & Miller, Federal Practice and Procedure: Civil §§ 2585, 2587.

We conclude that there was an adequate evidentiary record to support the findings of the district court that violations of constitutional rights by the Philadelphia police occurred in an unacceptably high number of instances and that in the absence of change in procedures such violations are likely to recur.

[6] It is not inappropriate to note that the same district judge decided the case of **Hughes v. Rizzo,** 282 F. Supp. 881 (E.D. Pa. 1968), where an injunction against alleged police misconduct was denied. That same judge is presently retaining jurisdiction of the case of **Commonwealth of Pennsylvania v. Joseph F. O'Neill, et al.,** Civil Action No. 70-3500 (E.D. Pa.), involving the hiring practices of the Philadelphia police.

[7] **See** note 5, **supra.**

That we do not reverse the district court's conclusions, however, does not mean that we are unaware of the idealism and dedication of the vast majority of police officers. Their duties are difficult and dangerous, and the work which they perform is too often unheralded and unappreciated. Even a casual review of the record of the citations for bravery awarded to some of the offending officers in this case cannot but impress the reader with the fact that often the most routine assignment may suddenly turn into one involving death or serious injury to the policemen. And yet, we place upon these officers the additional burdens of almost superhuman patience and forbearance in the face of hostile and provocative conduct and insist that they accord full legal protection and respect to those who would deny similar treatment to the officers. But such high standards must be maintained because of the tremendous importance of police work to the maintenance of an orderly society without which no rights can survive. We would fail in the respect which we owe the vast majority of policemen should we not fail to correct the derelictions of the few who do not meet the difficult standards which the community requires.

III.

The district court's order granting relief is limited and moderate in tone indicating its faith in the ability and willingness of the police department to investigate and correct the transgressions of its errant members. Despite the assertions of the defendants, the court is not thrusting itself into the day to day operations of the police department—a situation which we agree would be inadvisable

and inappropriate in the circumstances of this case. *Cf. Lankford* v. *Gelston,* 364 F.2d 197 (4th Cir. 1966). Indeed, the procedures which the district court required be implemented by the police department for the receipt, investigation, and disposition of civilian complaints are fully in accord with the American Bar Association Standards Relating to the Urban Police Function, which were unanimously approved by the Executive Committee of the International Chiefs of Police in December, 1972.

We agree with the district court in its refusal to appoint a "receiver" for the police department as requested by COPPAR. Whether such action might ever be necessary in the most extreme circumstances, we need not here consider because the factual situation in this case would not warrant such action. *See Build of Buffalo, Inc.* v. *Sedita,* 441 F.2d 284 (2d Cir. 1971).

We emphasize that the district judge did not find that the plaintiffs were entitled to a change in the disciplinary procedures of the police department as a matter of constitutional right. The decision on the necessity for relief was based upon violations of constitutional rights which had occurred and which he found would be recurring. It was only in the context of the proper remedy to be utilized that the district court reviewed the existing procedures and found them inadequate. The revisions were one of the forms of relief available and were ordered because they appeared to have the potential for prevention of future police misconduct. *Lewis* v. *Kugler, supra. See also The Federal Injunction as a Remedy for Unconstitutional Police Conduct,* 78 YALE L.J. 143 (1968); *Injunctive Relief for Violations of Constitutional Rights By the Police,* 45 COLO. L. REV. 91 (1973).

IV.

While we find no error in the injunctive relief decreed in this case, we do not believe that the record adequately explains the award of counsel fees to the plaintiffs.

The district court filed an order as follows:

"1. That the defendants shall pay to the plaintiffs in the *Goode* case, Civil Action No. 70-491, counsel fees in the sum of $25,000, plus disbursements and costs in the sum of $4,167.58.

"2. That the defendants shall pay to the plaintiffs in the *COPPAR* case, Civil Action No. 70-2430, counsel fees in the sum of $10,000, plus disbursements and costs in the sum of $250."

The accompanying memorandum recited that the court's discretion was exercised in favor of the award of counsel fees because "[t]he cases were brought for the vindication of constitutional rights, significant violations were established, and the plaintiffs succeeded in obtaining relief which should prove beneficial to all of the citizens of Philadelphia." The court also noted that the parties had been unable to reach an amicable agreement, even after its order setting out guidelines had been filed, and that the results achieved could not have occurred without the need for litigation. Nevertheless, the memorandum concluded that while plaintiffs' counsel had performed a valuable public service,[8] punitive measures were not called for. The memorandum and orders are ambiguous and leave us in doubt as to the basis on which the court exercised its discretion and by whom the payments were to be made.

Even if statutory authority is lacking, in the exercise of their equitable powers federal courts may award attor-

[8] In the **Goode** case, the court remarked that the efforts of plaintiffs' counsel were more nearly successful and their efforts were more directly devoted to attempting to obtain a rational solution but in the **COPPAR** litigation the plaintiffs were "somewhat less sensitive to the true public interest" and were less inclined toward an amicable settlement along the lines ultimately set out by the court.

neys' fees when the interest of justice so requires. *Hall* v. *Cole,* 412 U.S. 1 (1973). Although the rule is broadly stated, in application the power is generally exercised in three categories:

1. Where there has been bad faith, vexation, or oppression. In this class of cases, the punitive aspects predominate. *See, e.g., Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968); *Monroe* v. *Board of Commissioners of City of Jackson,* 453 F.2d 259 (6th Cir. 1972).
2. Where a common fund has been created, or closely analogous to this, where a definable class benefits from the litigation and an award enables the court to spread the expense among all who benefit. *E.g., Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970). *Cf. Brewer* v. *School Board of City of Norfolk,* 456 F.2d 943 (4th Cir.), *cert. denied* 406 U.S. 933, *sub nom.* 409 U.S. 893 (1972).
3. Where the private attorney general theory may have application—that is, where the litigation was instituted to vindicate a policy granted a high priority by a congressional action. *See, e.g., Lee* v. *Southern Home Sites Corp.,* 444 F.2d 143 (5th Cir. 1971).[9]

However, the equitable power may be circumscribed by Congress. *Hall* v. *Cole, supra.*

[9] The Supreme Court expressly declined to rule on this theory in **Hall v. Cole, supra,** although it discussed it in **Newman v. Piggie Park Enterprises, supra,** where the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3 (b) permitted an award of counsel fees in the court's discretion. **See also Bradley v. Richmond School Board,** ___ U.S. ___, 42 U.S.L.W. 4703, 4710 (May 15, 1974), where the court noted the high priority particularly accorded desegregation matters. In **Northcross v. Memphis Board of Education,** 412 U.S. 427 (1973), the Court expressly declined to consider whether and under what circumstances an award of attorney's fees might be permissible in § 1983 litigation.

Although 42 U.S.C. § 1983 contains no language dealing with counsel fees, there have been awards under the general equitable power in some cases brought under the terms of the statute. *See Skehan* v. *Board of Trustees of Bloomsburg State College,* ___ F.2d ___ (No. 73-1613, 3d Cir. May 3, 1974, *amended* June 11, 1974), and see the compilation of cases in *Gates* v. *Collier,* 489 F.2d 298 (5th Cir. 1973).[10]

The district court did not articulate the basis which it felt justified an award, and we think it important that this be done. Why the fees should be paid has significance in determining who is liable, and we do not feel that we should engage in speculation as to the district court's rationale.

We have similar difficulty in divining the district court's intentions as to the source of funds to satisfy the awards. There are two obvious alternatives: the defendants personally or the City of Philadelphia. Each choice, however, poses special problems which require examination by the district court, perhaps with additional fact finding for clarification.

Scheuer v. *Rhodes,* ___ U.S. ___, 42 U.S.L.W. 4543 (April 17, 1974), makes clear that officials in the executive department may be personally liable for damages in § 1983 cases. However, a qualified immunity is available as a defense when there is good faith on the part of the defendant. In *Skehan* v. *Board of Trustees, supra,* we held that this immunity would apply to assessments for counsel fees as well as to damages.

[10] Many of the cases fail to distinguish between awards made under §§ 1981, 1982 and 1983 even though these sections are derived from separate statutes and the rationale applicable to § 1982, for example, may not apply to § 1983. **See, e.g., Lee v. Southern Home Sites Corp., supra,** where the court cites the absence of criminal sanctions to enforce § 1982 as one reason to encourage private attorney general actions.

In the exercise of discretion, too, the district court should consider the fact that the defendants apparently did not personally participate in the incidents which led to the necessity of injunctive relief. *Respondent superior* is not applicable in its traditional sense since the defendant officials are not employers. Both subordinates and officials are employees of the governmental unit. *Jennings* v. *Davis,* 476 F.2d 1271 (8th Cir. 1973). In *Bracey* v. *Grenoble,* 494 F.2d 566 (3d Cir. 1974), this court assumed, *arguendo,* that no damages for the actions of a subordinate could be imposed upon a governmental official in the absence of his actual knowledge of, acquiescence in, or participation in the unlawful activity. *See also Vicarious Liability Under § 1983,* 6 IND. L. REV. 509 (1973).

Furthermore, we note that some of "the defendants" were not in office at the time the incidents arose and were substituted as parties only after the lawsuits were close to conclusion.[11] Similarly, some of the defendants who were officials during the period when the incidents occurred were not included among those liable since they were not parties at the time the order was entered.[12]

To summarize then, if it is the intention of the district court to find the defendants personally liable for an award of counsel fees, it will be necessary to consider the issues of:

1. official immunity;
2. vicarious liability; and
3. identification of the individuals liable.

[11] **See note 2 supra.**

[12] The former district attorney of Philadelphia would be liable under this order for a share of the counsel fees awarded the plaintiffs even though no member of the district attorney's staff was in any way involved in the incidents which convinced the court that injunctive relief was required. In **Bauers v. Heisel,** 361 F.2d 581 (3d Cir. 1966), this court held that the district attorney is not liable for damages under § 1983 because of judicial immunity.

Additionally, if it is contemplated that personal liability will be imposed, the equitable basis for making any award will require analysis. For example, the equities involved in a private attorney general or spreading-the-cost theory are less apparent if individuals are being ordered to reimburse the plaintiffs than if a large entity in which all claim membership is to pay the assessment. Correspondingly, the traditional test of obduracy and intransigence may have far more significance if individual liability is involved.[13]

If it is the thought that the City of Philadelphia, although not a party to this litigation, is to be the source of the funds, then other issues must be passed upon by the district court with appropriate assistance from counsel.

Kenosha v. *Bruno,* 412 U.S. 507 (1973), clarified some earlier uncertainty by holding that a city is outside the ambit of § 1983 "for purposes of equitable relief as well as damages" and may not be a named defendant in such a case. *Edelman* v. *Jordan,* 415 U.S. 651 (1974), held that while an injunction could be issued against a state officer, damages or "equitable restitution" could not be imposed when in fact they would come from the state. We held in *Skehan* v. *Board of Trustees, supra,* that the prohibition of the Eleventh Amendment extends to an award of counsel fees from the state treasury, although that would not be so if the payment were to be made by a college which was a subsidiary governmental unit.[14]

[13] In discussing fees, the district court did say that "punitive measures are not called for" and that "no conscious policy of permitting or encouraging widespread violations of constitutional rights by police officers" existed.

[14] The court's opinion noted that a cause of action under 28 U.S.C. § 1331 had been asserted and that therefore it was not significant that the college was not a "person" under § 1983. Since the parties to the litigation **sub judice** argued only § 1983 jurisdiction, we consider only that theory. **Moor v. County**

The district court, therefore, should consider whether under the facts and circumstances present in this case the rationale of *Edelman* as it deals with sovereign immunity should apply to the statutory exclusion granted a city under § 1983.[15]

Note 14 Continued

of Alameda, 411 U.S. 693, 696 n.4 (1973). Convincing proof of the parties' intent is the **COPPAR** motion to add the City of Philadelphia as a defendant on the expectation that the **Moor v. County of Alameda** case, **supra**, which was then pending in the Supreme Court, would result in a county being declared a "person." The motion was not acted upon, and the city is a named defendant in neither case. **Goode** asserted only § 1983 and § 1988 claims. We leave open for district court consideration the question of § 1331 jurisdiction which **COPPAR** alleged. As to whether **Goode** could amend to allege such a jurisdictional ground, **see 28** U.S.C. § 1653. Similarly, whether the City of Philadelphia could or should be joined under § 1331 is not before us, and in view of such problems as the statute of limitations, laches and respondent superior, we do not pass upon it.

[15] There are numerous cases in which counsel fees have been assessed against school boards without any discussion of whether those entities are "persons" under § 1983. The definition of "person" under this specific statute is far from clear, and there are inconsistencies in the case law. Contrast, for example, U.S. **ex rel. Gittlemacker v. County of Philadelphia,** 413 F.2d 84 (3d Cir. 1969), with **Scher v. Board of Education of Town of West Orange,** 424 F.2d 741 (3d Cir. 1970). For a resume of the cases in this circuit demonstrating the problem, **see** Thornberry, **Suing Public Entities Under the Federal Civil Rights Act: Monroe v. Pape Reconsidered,** 43 U. Colo. L. Rev. 105 (1971). The Supreme Court has met the issue only in cases involving cities and counties. **Kenosha v. Bruno, supra, Moor v. County of Alameda, supra,** and **Monroe v. Pape,** 365 U.S. 167 (1961). Curiously, despite the many cases before the Supreme Court in recent years in which school boards were among the named defendants, the issue of whether the board is a "person" has never been decided by the Court. For the view that the "person" exclusion should be narrowly construed in order to carry out the purpose of the Civil Rights Act, **see** Kates and Kouba, **Liability of Public Entities Under Section 1983 of the Civil Rights Act,** 45 S. Cal. L. Rev. 131 (1972).

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Another matter which may be of significance is whether any of the individual defendants would have the power under the city charter or Pennsylvania law to authorize disbursement of funds in this situation. In exercising its discretion to award counsel fees, the district court would no doubt be concerned with the efficacy of its pronouncement.

The issues which would be raised by an award of counsel fees in this case are broad and complex. We believe they should be resolved only upon a record which would clearly specify the grounds upon which the district court relied. Of course, we take no position at this time as to whether fees should be awarded or if so, against whom they should be assessed.

The judgment of the district court will be affirmed as to the injunctive relief granted but will be vacated and remanded as to the award of counsel fees for further proceedings not inconsistent with this opinion.

Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 70-491

GERALD G. GOODE, et al.

v.

FRANK L. RIZZO, et al.

FINAL JUDGMENT

AND Now, this 5th day of October, 1973, following a trial before the undersigned District Judge wherein the issues were duly tried and a decision rendered.

It is ORDERED and ADJUDED that:

1. Defendant Joseph F. O'Neill, Police Commissioner, shall forthwith promulgate as an intra-departmental directive procedures for the receipts, investigation and disposition of civilian complaints of police misconduct, substantially in the form of the procedures attached to this Order as Appendix "A". Such directive shall, in addition to normal departmental distribution, be posted prominently in a conspicuous position at the reception desk of the Police Administration Building, at all district/unit headquarters, at the Mayor's Office for Information and Complaints, at the reception area of the Philadelphia Commission on Human Relations, and at such other places as the Commissioner may determine to be appropriate for the effective dissemination of information to individuals having contact with Philadelphia police officers.

Copies of the directive shall be maintained in quantity at all of the above locations and shall be provided upon

Appendix

request to any persons either specifically requesting copies of the directive or inquiring generally into the procedures for lodging complaints against police officers.

2. (a) Within fifteen (15) days from the date of this Order, the Philadelphia Police Department shall promulgate a form (Citizen's Complaint Report) for the use of complaining parties in lodging complaints against police officers.

(b) The Citizen's Complaint Report shall designate and provide adequate space for, the name, address and telephone number of the complainant; the name, address and telephone number (if known) of the alleged victim of police misconduct if other than the complainant; the name, badge number or other identifying characteristics of the police officer(s) against whom the complaint is lodged; the date, time and location of the incident giving rise to the complaint; a narrative description of the events giving rise to the complaint; the names, addresses and telephone numbers of other witnesses to the alleged incident (if known); the names, badge numbers, or other identifying characteristics of other Police Department personnel witnessing or involved in the incident giving rise to the complaint; a statement whether the complainant, the alleged victim of police misconduct (if other than the complainant) or any other witness to the alleged incident was questioned, detained, arrested and/or charged with criminal behavior as a result of the events giving rise to the complaint; the name, address and telephone number of any attorney or other representative of the complainant to whom communications concerning the complaint, its investigation and disposition should be addressed in lieu of the complainant (applicable only where the victim of the alleged police misconduct is himself the complainant); a place for the signature of the complainant.

(c) Within five (5) days following receipt of the proposed form by the Court and by the attorneys for plaintiffs herein, the attorneys for plaintiffs shall forward to the Court their comments and alternative suggestions, if any.

(d) Within thirty (30) days from the further Order of this Court approving a form for the receipt of complaints, the Philadelphia Police Department shall cause sufficient copies of the approved Citizen's Complaint Report to be printed and distributed in accordance with the further provisions of this Order.

(e) Sufficient quantities of the Citizen's Complaint Report shall at all times be maintained at the following locations: a designated office within the Police Administration Building; all district/unit headquarters; the Mayor's Office for Information and Complaints; the main office of the Philadelphia Commission on Human Relations; a designated office of the District Attorney's Office

3. Civilian complaints of police misconduct which have been received by the Philadelphia Police Department on or after March 14, 1973, and which have not heretofore been finally disposed of, and all such complaints which may be received between the present date and the date on which an approved Citizen's Complaint Report form is promulgated in accordance with paragraph 2 of this Order, shall be processed in accordance with the procedures attached hereto, notwithstanding the initial unavailability of the official Citizen's Complaint Report form. Any such complaint which has been received since March 14, 1973, and which has heretofore been disposed of shall, upon written request of the complainant made within thirty days after the date on which the official Citizen's Complaint Report forms are available, be reprocessed in

accordance with the procedures attached; and appropriate notices shall be posted (at the locations where the complaint forms are made available pursuant to this Order) giving notice of this right.

4. Within thirty (30) days from the date of this Order, the Philadelphia Police Department shall file with the Court and serve upon counsel for plaintiffs a copy of the proposed manual for the training of police recruits, limited to the matters expressed in the Opinion and Order of this Court dated March 14, 1973. Within fifteen (15) days thereafter plaintiffs may file with the Court and serve upon defendants their additional or alternative suggestions, if any, concerning the contents of such manual.

5. Within sixty (60) days from the date of this Order, the defendants shall file with the Court and serve upon plaintiffs a certification of compliance with the provisions of this Order.

6. The defendants shall maintain adequate statistical records, and annual summaries thereof, to provide an adequate basis for evaluation of the program for handling civilian complaints.

7. This Court reserves jurisdiction to modify this Order and the attached procedures, and to grant such further relief as may be appropriate, upon the application of any party in interest.

By The Court:

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J.

PHILADELPHIA POLICE DEPARTMENT DIRECTIVE 127

SUBJECT: CITIZEN'S COMPLAINT AGAINST POLICE

I. POLICY

A. All citizens complaints against police officers shall be received, investigated and disposed of in accordance with the procedures set forth herein, and complainants will be notified of the action taken by the Police Department.

B. Copies of this directive and special pre-numbered complaint forms entitled "Citizen's Complaint Report" both published in separate English and Spanish language versions shall be supplied in quantity to all Police Districts and Units and each district/unit shall be accountable for the allocated numbers issued. Additional copies of this directive and of such forms shall be supplied in quantity to the Philadelphia Commission on Human Relations and to the District Attorney's office.

C. A control log of sequential numbers shall be maintained in each Operations Room.

D. The Internal Affairs Bureau shall be the central control agency for the Police Department in all cases of citizen's complaints against police.

E. A Staff Inspector will be available to receive complaints from the nine police divisions on a 24-hour basis.

F. Either upon specific request, or in the event that a person requests general information concerning the lodging of civilian complaints against police officers, all departmental personnel shall refer such person to the nearest location where copies of the Citizen's Complaint Report may be obtained.

APPENDIX "A"

II. PROCEDURE FOR RECORDING AND PROCESSING COMPLAINTS

A. The Operations Supervisor in the district-unit receiving the complaint shall:

1. Provide to the complainant a Citizen's Complaint Report and instruct the complainant to fill in the required information on the form and sign it. In no event shall any Departmental personnel attempt to discourage or otherwise influence any person from lodging his complaint.

2. Record on the Control Log the Report Number, the D.C. Number, the complainant's name and address, the date and time of the complaint, and the name of Staff Inspector notified.

3. Prepare a 75-48, completing all block headings and Code 2703, "Complaints Against Police".

4. Notify the Staff Inspector on duty and record his name, date and time of notification on the Citizen's Complaint Report.

5. Affix signature and badge number.

6. Distribute the completed Citizen's Complaint Report as follows:

Original —Chief Inspector, Internal Affairs Bureau
1st Copy —Staff Inspector notified
2nd Copy —District/Unit Commanding Officer
3rd Copy —Complainant

7. Distribute 75-48 as follows:

White —Reports Control and Review
Yellow —District/Unit Commander
Pink —Staff Inspector notified

B. The Staff Inspector on duty shall evaluate the complaint and if possible, interview the complainant by phone. If an immediate investigation is indicated, the Staff Inspector shall confer with the pertinent Chief Inspector who will ensure that a proper investigation is initiated.

III. COMPLAINTS RECEIVED IN DISTRICT OTHER THAN THE DISTRICT/UNIT OF OCCURRENCE

A. Complaints received in a district or unit other than the district or unit of occurrence shall be processed in the following manner:

1. The Operations Supervisor in the district/unit where complaint is being reported shall:

(a) Have the complainant fill out a Citizen's Complaint Report as outlined in Section II of this directive.

(b) Obtain a D.C. number from the district of occurrence and insert on Citizen's Complaint Report and on the Control Log.

(c) Notify Staff Inspector on duty.

(d) Prepare 75-48 and distribute as follows:

Original —Reports Control and Review
Yellow —Pertinent District/Unit Commander
Pink —Staff Inspector notified

IV. INVESTIGATION OF COMPLAINTS

A. All civilian complaints concerning police misconduct which are filed within six months of the event giving rise to the complaint shall be received, investigated and disposed of in accordance with the procedures set forth herein. Complaints which are received more than

six months after the occurrence of the event giving rise to the complaint may be so investigated and disposed of in the discretion of the Chief Inspector, Internal Affairs Bureau.

B. Upon receipt of the citizen's complaint report, the Chief Inspector, Internal Affairs Bureau, shall immediately assign a member of his staff who shall have responsibility for the investigation of the alleged incident. All such investigations shall be initiated by, and insofar as practicable carried out by, the staff of the Internal Affairs Bureau. The staff of the Internal Affairs Bureau shall have direct responsibility for all investigations. No such complaint shall be referred for investigation to the commanding officer of the police officer against whom the complaint is lodged, or to any other officer of the same command.

C. The investigation by the Internal Affairs Bureau shall include, but need not be limited to, the following: interviews with the complaining witness, the alleged victim of police misconduct (if other than the complaining witness), and all other witnesses to the incident who are indicated on the complaint form; interviews with the police officer against whom the complaint is lodged and all other police officers witnessing or involved in the alleged incident; interviews with all other witnesses to the alleged incident who became known to the investigating officer as a result of his investigation; view and analysis of all physical evidence, if any, associated with the alleged incident; in the event that a criminal complaint has been lodged against any witness or participant in the event, a review and analysis of the investigation file compiled by the Police Department or the District Attorney's office in connection with such criminal complaint; such other investigative steps as may appear

appropriate in the experience of the assigned investigator.

D. The assigned investigator shall attempt to secure written statements from all participants in and witnesses to the alleged incident but, where any witness or participant is unwilling to make a signed written statement, the assigned investigator shall provide his own written summary of the oral statement, if any, provided by such participant or witness. No participant or witness shall be required or coerced into making an oral or written statement against his will. Where a written statement is given and signed by a participant or witness, the assigned investigator shall provide the person making such statement with a copy.

E. All investigations shall be completed within 45 days from the date of receipt of the complaint form by the Internal Affairs Bureau, except for extenuating circumstances stated in the file and approved by the Chief Inspector, Internal Affairs Bureau.

F. 1. When a complainant is unable to identify the police officer against whom a complaint is lodged by name or badge number, the complaint shall be forwarded to the Internal Affairs Bureau and the investigation shall commence in accordance with the procedure set forth above. In addition to the procedures set forth above, however, the assigned investigator shall make every reasonable effort to assist the complainant in making a positive identification of the police officer.

2. Where sufficient facts are adduced by a complainant (e.g. identifying number of police car, identity of other police officers in the vicinity and participating or witnessing the event, patrol sector, time and date, physical description and the like), the assigned investigator shall

provide the complainant with the opportunity to view photographs of the population of the police officers most likely to include the officer against whom the complaint is lodged or, where possible, shall provide the complainant with other opportunity to make a positive identification.

G. 1. Upon completion of his investigation, the assigned investigator will prepare an Investigation Report (75-49) and distribute as follows:

Original	—Reports Control and Review
Yellow	—Chief Inspector, Internal Affairs Bureau
Pink	—Pertinent Detective Division Commander (if investigation reveals a crime has been or may have been committed)
Goldenrod	—Staff Inspector notified
Green	—Pertinent District/Unit
Blue	—Police Department's legal advisor (hold until investigation is completed and submit with copies of all related case material.

2. Together with the yellow copy of the Investigation Report (75-49) the assigned investigator shall foward the entire investigative file (which shall include the Citizen's Complaint Report, or other report of complaint and all investigative notes and statements) to the Chief Inspector, Internal Affairs Bureau.

3. The Chief Inspector, Internal Affairs Bureau, or a Staff Inspector assigned by him, shall promptly review the entire file and shall determine the accuracy of the Investigation Report provided by the assigned investigator. Upon completion of the review (including revision and redistribution of the Investigation Report if necessary or the completion of further investigation which the Chief In-

spector may direct), the entire file shall be forwarded to the Police Commissioner together with a recommendation of the Chief Inspector, Internal Affairs Bureau, concerning the appropriate disposition of the complaint.

4. Except for extenuating circumstances stated in the file, the file and the recommendation of the Chief Inspector, Internal Affairs Bureau, shall be forwarded to the Police Commissioner within 50 days of receipt by the Internal Affairs Bureau of the Citizen's Complaint Report.

V. ANONYMOUS COMPLAINTS

A. In all instances in which an anonymous complaint is received by a member of the Police Department concerning allegations of misconduct, the individual receiving the complaint shall notify the anonymous complainant of the availability of the procedures for lodging a formal complaint.

B. Should the anonymous complainant persist in his desire to remain anonymous, the individual receiving the complaint shall elicit all facts which the complainant can provide and shall record and process the complaint in the same manner as outlined herein with the exception that the Operations Room Supervisor shall fill out the "Citizen's Complaint Form" and in space provided for complainant's signature indicate "anonymous complainant".

C. Upon receipt, the Internal Affairs Bureau shall make such investigation of the alleged incident as is possible based upon the facts presented. Where the information permits the identification of the alleged victim of police misconduct or of any witness to the alleged incident, the investigating officer shall contact the alleged victim (or shall contact such other witnesses in an attempt to determine the identity of the alleged victim) and shall inform him of the opportunity to lodge a formal complaint.

D. In the event that the alleged victim of police misconduct is identified, contacted by the investigating officer and informed of the formal complaint procedures, the failure of the alleged victim to execute a formal complaint shall be grounds for termination of the investigation. Where, however, the alleged victim cannot be identified but investigation of the facts adduced by the anonymous complainant provides supportive evidence for an act of police misconduct by an identified police officer, the investigating officer shall complete the investigation to the extent possible and shall submit his report in the manner herein provided.

VI. DISPOSITION OF FRIVOLOUS COMPLAINTS

A. Where the facts alleged in the Citizen's Complaint Report, if accepted as true in all respects and interpreted in the light most favorable to the complainant or the alleged victim of police misconduct (if other than the complainant), disclose no improper behavior on the part of the police officer against whom the complaint is lodged, the assigned investigator may refer the complaint to the Chief Inspector, Internal Affairs Bureau, with the recommendation that the investigation be terminated and the file closed. If, upon review of the investigation file, the Chief Inspector concurs in the recommendation of the assigned investigator, the Chief Inspector may terminate the investigation and so advise the Commissioner in writing, at which time the Commissioner shall cause notice to be given to the complainant and to the alleged victim of police misconduct (if other than the complainant) or his attorney or other representative designated in the Citizen's Complaint Report.

B. In all instances, the assigned investigator shall interview the complainant and the alleged victim of police misconduct (if other than the complainant) prior to forwarding a recommendation to the Chief Inspector, Internal Affairs Division, that the investigation be terminated as frivolous. In each such instance, the assigned investigator shall forward with his recommendation a copy of the Citizen's Complaint Report, the written statement(s) of the complainant and the alleged victim of police misconduct (or if no such statement was voluntarily given, the assigned investigator's summary of any oral statement(s) given) or the statement of the investigating officer that the complainant and alleged victim of police misconduct were contacted and given the opportunity to make a statement, but refused to make a statement, whether oral or written.

VII. COMPLAINTS RELATIVE TO CRIMES

A. If the complaint alleges a crime and subsequent investigation establishes the fact, the provision as outlined in Directive 79 shall be followed.

B. In the event that the complainant or the alleged victim of police misconduct (if other than the complainant) and/or the police officer(s) charged with misconduct have been arraigned on criminal charges based upon the events upon which the Citizen's Complaint Report is founded, the investigation and disposition of the complaint will proceed in conformity with the procedures set forth herein, except that the complainant or the alleged victim of police misconduct (if other than the complainant) may elect not to give a written or oral statement either to the assigned investigator or before the Police Board of Inquiry, or both, until the final disposition, including appeal, of all such criminal charges. In the event

the complainant or alleged victim makes such an election, the investigation will remain open until such criminal charges have reached final disposition, including appeal, and the opportunity given anew to the complainant or alleged victim to make such a statement. The institution of criminal charges against the complainant or the alleged victim of police misconduct (if other than the complainant) shall toll the six-month period of time in which a complaint must be lodged after the occurrence of the event giving rise to the complaint.

C. No complaint shall be refused or not investigated where the facts indicate that criminal charges based upon the event giving rise to the complaint are pending against the complainant or the alleged victim of police misconduct.

VIII. DISPOSITION OF COMPLAINTS

A. Upon receipt of the file and the recommendation of the Chief Inspector, Internal Affairs Bureau, the Commissioner of Police or a Deputy Commissioner assigned by him, shall review the entire file and determine the appropriate disposition of the complaint.

B. 1. In all cases in which the facts are not in dispute and the Commissioner determines that the accused police officer is guilty of misconduct, the Commissioner shall impose such sanctions upon the offending officer as he shall deem appropriate.

2. In all cases in which the file discloses that the facts concerning the charge are in dispute and require resolution in order to determine whether the officer is guilty of improper conduct, the Commissioner shall certify the complaint to the Police Board of Inquiry ("Board") for a hearing.

3. In all cases in which the facts are not in dispute and the Commissioner determines either that there is no probable cause to believe that the police officer committed the alleged act or that the act complained of did not constitute improper behavior, the Commissioner may certify the file closed and the investigation complete and direct that no further action be taken in regard to the complaint.

C. 1. The action of the Commissioner in disciplining the offending officer, in certifying the complaint to the Board or in terminating the investigation shall be communicated in writing, by certified mail, to the complainant and to the alleged victim of the police misconduct (if other than the complainant) or to the attorney or other representative of the alleged victim identified in the Citizen's Complaint Report. The action of the Commissioner shall also be so forwarded in writing to the officer against whom the charge was made.

2. Except for extenuating circumstances stated in the file, the determination of the Commissioner and the notice to the parties to the complaint shall be made within 60 days from the receipt of the complaint by the Internal Affairs Bureau.

3. In those instances in which the Commissioner terminates the investigation without certification to the Board for hearing, the notice to the complainant and to the alleged victim shall include a summary of the investigative findings and the reason for the Commissioner's action.

IX. HEARINGS

A. Upon certification by the Commissioner of a complaint to the Board for hearing. the Board shall schedule

a hearing to be held within 20 days from the certification of a complaint. Not less than 10 days written notice of the time and place of the hearing shall be given by certified mail to the complainant and to the alleged victim of police misconduct (if other than the complainant) or to his attorney or other representative designated in the Citizen's Complaint Report, and to the police officer charged with misconduct.

B. Continuances or other delays in the scheduled hearing date may be granted only by a member of the Board or a duly authorized administrative assistant of the Board, in writing, for cause given by the party requesting such continuance or delay. Where a continuance is granted, the hearing shall be rescheduled to be held within 10 days from the date of the first scheduled hearing, if possible, and notice shall be given to the parties by certified mail.

C. Hearings shall be informal and strict rules of evidence will not be applied. The assigned investigator and any officers against whom charges have been placed shall attend. All parties may be represented by counsel or other representative and shall have the right to present evidence and to examine and cross-examine witnesses. A stenographic record shall be kept and shall be made available, at cost, to any party to the proceedings requesting same. All hearings shall be open to the public, except that hearings may be closed by the Board where necessary to maintain order.

D. The Board, after hearing, shall make written findings of ultimate facts and based thereon shall find the police officer(s) against whom the complaint has been lodged either "guilty" or "not guilty" of misconduct. The failure of the alleged victim of police misconduct to appear and to present evidence may, in the discretion of the Board, constitute grounds for termination of the hear-